U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 September 2006

CASE NO.: 2004-LHC-1464

OWCP NO.: 07-167403

IN THE MATTER OF:

J.P.[1]

Claimant

v.

EUREST SUPPORT SERVICE/COMPASS

Employer

and

ZURICH AMERICAN INSURANCE COMPANY

Carrier

APPEARANCES:

LOUIS R. KOERNER, JR., ESQ.
For The Claimant

MICHAEL W. ADLEY, ESQ.
For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Claimant against Eurest Support

[1] Pursuant to a policy decision of the U.S. Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

Service/Compass (Employer) and Zurich American Insurance Company (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on May 11, 2006, in Covington, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered two exhibits and Employer/Carrier proffered 12 exhibits which were admitted into evidence. This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

During the hearing, the parties stipulated, and I find:

1. That the Claimant was injured on February 12, 2002. (Tr. 19).

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on February 12, 2002. (Tr. 20).

5. That Employer/Carrier filed a Notice of Controversion on August 5, 2003. (Tr. 23).

6. That an informal conference before the District Director was held on December 23, 2003. (Tr. 23).

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[2] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; and Employer/Carrier's Exhibits: EX-___.

7. That Claimant's average weekly wage at the time of injury was $516.33. (Tr. 20).

8. That Claimant died on October 8, 2004, as a result of metastatic prostate cancer. (Tr. 22).

II. ISSUES

The unresolved issues presented by the parties are:

1. Timeliness of Claimant's claim.

2. Whether Claimant sustained an accident/injury while employed with Employer.

3. The nature and extent of Claimant's disability.

4. Entitlement to and authorization for medical care and services.

5. Whether Claimant is precluded from compensation entitlement from Employer/Carrier for failure to obtain approval of his settlement agreement with another employer under Section 33(g) of the Act.

6. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was deposed on February 11, 2003, by the parties in a civil lawsuit which Claimant filed against Stolt Offshore, Inc. (EX-1). He began working offshore in 1998 as a galleyhand. (EX-1, p. 22). He began working for Employer in 2000 or 2001 as a "troubleshooter." (EX-1, p. 26). He worked for Stolt and Employer at the same time. (EX-1, p. 27).

Claimant testified that the last job he worked for Employer began on the night of Mardi Gras on February 12, 2002. While he was being transported by vessel to the production platform, he fell asleep on a bench or seat of a high-back chair and awoke with a "crook" in his neck and pain. He worked until the following Sunday and called for relief because of his pain. (EX-1, pp. 27-28, 31, 36). On Thursday, he was rubbing his neck

with Ben Gay when the platform production supervisor asked what had happened to which Claimant reported his falling asleep on the vessel and awaking with neck pain. By Friday, he stated his pain was intense and he called for relief on Saturday. (EX-1, p. 34).

When Claimant called Employer's dispatcher for relief, he related his falling asleep on the vessel and his neck pain which was then running up around his shoulder. (EX-1, pp. 37-38). The production supervisor completed a report about his "accident/injury" which Claimant signed before he left the platform. (EX-1, pp. 43, 45). A safetyman picked him up at the dock late Sunday night and told him to take a few days off, go to a doctor, get a release and come back to work. Claimant took a couple of days off, used a heating pad on his neck, applied Ben Gay and took Aleve. He did not seek medical care or treatment for his condition. On Monday, Stolt called about a job. Claimant informed Will McCombie, his Stolt supervisor, that he needed a few days off and would call on Wednesday. (EX-1, p. 40).

Claimant testified that by Wednesday he was beginning to feel a little better and "the pain had relieved itself." The pain was not as intense and "it wasn't as bad at all." (EX-1, pp. 45-46). On Thursday, he shipped out as a relief cook for Stolt. (EX-1, p. 40). He did not report his "accident/injury" with Employer to Stolt. (EX-1, p. 51). He worked a 28-day hitch on three to five different vessels for Stolt during which he took Aleve when his neck got stiff but seldomly used Ben Gay. He stated the pain began to decrease and wasn't as bad as when it first began. (EX-1, p. 52). After the 28-day hitch, he stated his neck was not hurting that much, if any, and "can't remember the neck hurting me hardly at all." (EX-1, p. 55).

He took four days off and was called out again by Stolt to work on the vessel ROVER. He did not seek medical treatment during his four days off because he "was healing," and did not mention his neck problem to Stolt because it was "going away." (EX-1, pp. 56-57). He took 10-14 Aleve pills during the second hitch. (EX-1, p. 59).

Claimant testified that he again felt discomfort when picking up groceries aboard the ROVER. (EX-1, p. 61). He explained that he and his co-workers were receiving groceries for the galley by way of a plywood ramp which allowed groceries to slide down from the deck level to the pantry. He attempted to slow down the boxes by holding out his right hand and felt a

"shocking sensation" when his hand hit a box of canned goods which weighed about 60-65 pounds. The sensation went throughout his "back, all down my arms like somebody had hit me with a live wire" which he tried to shake it and move his neck. The shocking sensation lasted about 45 seconds. He stated he had some numbness in his hands but the shocking was gone. (EX-1, pp. 62, 64-65, 83-84, 98). He thereafter continued with his duties in the freezer. (EX-1, pp. 93, 95). He stated he felt weakness for a while until he went to bed three or four hours later, and still had numbness in his hands the next morning. (EX-1, pp. 98, 100). He estimated the incident took place between April 10-15, 2002. (EX-1, p. 109).

Claimant testified that he reported the shocking sensations and a little pain to the vessel Captain. He explained to the Captain that the first time he felt any kind of pain was when he fell asleep on the vessel while going to a job with Employer. He related that he awoke with a "crook in his neck" and treated it with a heating pad, Aleve and Ben Gay. He informed the Captain that he needed to go to Wal Mart to purchase Aleve and a heating pad because of the shocking sensation incident while working on the ROVER. (EX-1, pp. 102-103). He did not fill out an accident or injury report and did not ask to see a doctor. He remained on the vessel ROVER for the next two weeks or to the latter part of April 2002. He ended his 28-day tour early to attend seaman certification school in Morgan City, Louisiana. (EX-1, pp. 104-105).

Claimant stated that Aleve "did all the good in the world" the first time he awoke with neck pain, but not after the shocking sensation incident. He used heat on his neck and right shoulder, but it did not provide any relief. (EX-1, p. 110). When he left the vessel on a Friday he noticed weakness on his right side and right leg and numbness in the tips of his fingers of both hands. (EX-1, pp. 107, 109). He reported to school on Monday in Morgan City where he was to attend classes for two weeks. On the third day of school, Stolt called him out for another job, but he was not able to report because he was walking "wobbley" and with a limp and jerk in his leg. (EX-1, p. 111). He stated he did not report to work because he began falling down and decided to go see a doctor. (EX-1, pp. 112-113).

Claimant informed "Sean" of Stolt about his shocking sensation incident when Sean inquired why he could not work. Sean told Claimant to call when he found out what was wrong.

Claimant informed Sean that "maybe I done re-injured" his neck. (EX-1, pp. 116-118).

Claimant went to the Emergency Room at West Jefferson Hospital on a Friday, about May 10, 2002. He explained to the doctor that he had fallen asleep on a vessel while working for Employer, but was getting better until the shocking incident and after that "everything went downhill." The Emergency Room doctor recommended he see a neurologist. (EX-1, pp. 115-116). The following Monday or Tuesday, Claimant was examined by Dr. Freiberg who referred him to a neurosurgeon, Dr. Steck, who ordered an MRI. (EX-1, pp. 119-120). Claimant stated he presented Stolt's insurance card for payment of his emergency room charges as well as to Drs. Freiberg and Steck, but, except for perhaps the emergency room charges, the bills were not paid. (EX-1, pp. 121, 123-124).

Dr. Steck told Claimant he needed surgery, because of his cervical vertebrae crushing against his spine, which he underwent on or about June 5, 2002. (EX-1, p. 122).

Claimant recalled completing an insurance claim form and speaking with an insurance lady who asked when he first felt any discomfort in his neck to which he responded when he fell asleep on a vessel while working for Employer. He testified that later, after his shocking sensation incident, he felt "a whole different pain in there." (EX-1, pp. 126-128).

Claimant denied telling Will McCombie or Sean Leland of Stolt that the problems he was experiencing, for which he needed medical treatment and surgery, did not happen while he was working for Stolt on the ROVER, but happened while working for Employer (Eurest). (EX-1, pp. 130-131). Claimant testified he could not make such a statement because everything started going downhill after the ROVER grocery incident which was the first time he felt numbness about which he told both Sean and Will of Stolt. (EX-1, p. 131). Claimant also denied that he ever told Sean or Will of Stolt or the Stolt insurance representative that he never injured himself with Stolt on the vessel ROVER. He explained that he could not have stated that "because that is when it happened." Claimant affirmed that is what he told the emergency room doctor, Dr. Freiberg and what Dr. Steck read in Dr. Freiberg's report. (EX-1, pp. 133, 136).

Claimant had not filed a claim against Employer (Eurest) at the time of his deposition. (EX-1, p. 140).

Philip Fremin

Mr. Fremin testified at the formal hearing. He has been the Vice-President of Finance and Administration for Eurest for the last 15 years. (Tr. 25).

In his duties he monitors longshore and litigation claims asserted against Employer. In such a capacity, if an employee requested authorization for medical treatment it would have been brought to his attention. He testified that Claimant never requested medical treatment from Eurest to his knowledge. (Tr. 26). Such a request would have been made to the safety manager who would report such a request to Mr. Fremin. No such report was ever received. (Tr. 27).

Mr. Fremin also stated that if any medical treatment reports had been received by Eurest such reports would have been brought to his attention and none were. (Tr. 27).

Mr. Fremin testified that written authorization was never given for Claimant to settle his claim against Stolt. Such a request would have been brought to his attention and never was. (Tr. 28).

Mr. Fremin stated Eurest's policy when an employee complains of a medical problem on the job is to refer the employee to the company doctor and then to their own doctor. The employee needs a medical excuse to return to work, clearing up their complaint. If an employee does not return to work, his employment is eventually terminated. (Tr. 28-29). The employee is placed on "medical in [the] dispatch system" and remains so until the employee produces a medical excuse from their doctor or 30 days from that date they are usually terminated if they do not return. (Tr. 29). The employee is considered "medically unfit" until he produces a doctor's excuse to return to work. (Tr. 32).

Mr. Fremin was aware of Claimant's complaint in February 2002. James Graham, the safety manager, informed that Claimant complained of sleeping wrong and waking up with a "crick" in his neck and "that he [Claimant] was going to take care of it himself. Probably put some Ben Gay on it when he got home." (Tr. 34).

Mr. Fremin confirmed that he spoke with Judd Voorhies of Stolt who informed that Claimant had an incident with Stolt which Stolt "felt was an aggravation of his previous complaint

with [Eurest] and that we [Eurest] would have to pay for the claim." He informed Mr. Voorhies that Claimant should contact Eurest, but he did not think it was Eurest's claim. (Tr. 35-36). He never discussed Claimant's surgery with Mr. Voorhies. (Tr. 37).

Judd Voorhies

Mr. Voorhies was deposed on July 24, 2003. He was a consulting claims manager for Stolt in 2002. He handled offshore insurance claims for Stolt. He confirmed that Claimant was employed by Stolt in April 2002 when he claims to have had an accident. (CX-1, p. 1).

He testified Claimant telephoned Will McCombie, the catering manager, on May 24, 2002, which was the first knowledge he had of Claimant having a problem. Subsequently, on June 27, 2002, Stolt received a letter from Attorney David Bernberg asserting a claim on Claimant's behalf for an injury on February 12, 2002, which Claimant had indicated occurred while he was employed at Eurest. (CX-1, p. 3).

Mr. Voorhies testified Claimant informed Mr. McCombie and Mr. Voorhies that he never got hurt while working for Stolt. (CX-1, pp. 3-4). Claimant refused to give a statement to that effect based on advice from his attorney. (CX-1, p. 5).

Lisa Comeaux

Ms. Comeaux was deposed on July 15, 2003, by the parties in the civil lawsuit filed by Claimant against Stolt. (EX-4). She was hired as Employer's Manager of Human Resources on October 14, 2002, and was not employed by Employer during the tenure of Claimant. She confirmed that Claimant was employed by Employer from August 8, 2000 to March 26, 2002, as a supervisor for offshore catering crews. Claimant's last day of work was February 17, 2002. Claimant was terminated as "medically unfit." (EX-4, pp. 3, 5, 25).

Michael Comeaux, dispatcher, prepared an "Incident History Maintenance" on February 17, 2002, which reflects "Jesse coming in due to pain in his shoulder. He can barely pick his arm up. He slept on his shoulder on a wooden bench at the dock and on a narrow bench on the boat ride. It started hurting after he got on the job. It feels like a pulled muscle. He is taking Aleve and applying Ben Gay and it still hurt. No work on 2/17." (EX-4, pp. 4, 26).

The "Weekend Calls" list for the period from February 15-18, 2002, reflects Claimant called from the platform on February 16, 2002 at 5:14 p.m., stating that he was "having back pain needs a relief." (EX-4, pp. 5, 59). On February 17, 2002, Claimant called again several times reporting he was still on the platform awaiting transportation. (EX-4, pp. 6, 60). James Graham, Employer's Safety and Health Manager, picked up Claimant in Venice, Louisiana. (EX-4, pp. 6-7).

Claimant's personnel file does not reflect whether Claimant requested medical treatment. A "file documentation note" from Mr. Graham discloses that Claimant "was offered to be taken to the company doctor for evaluation. He stated, no, he did not need it. This was not a work-related injury. He just slept wrong going to the job. That he would see his own doctor. Claimant never returned to work or show (sic) a medical release to return to work. He was terminated for medically unfit on March 26, 2002." (EX-4, pp. 8, 66).

On May 24, 2002, another "file documentation note" reveals that Mr. Voorhies of Stolt reported that Claimant was "now going to have surgery on his neck, and it is our fault due to his injury on the boat when he slept wrong." (EX-4, pp. 8, 67).

The Medical Evidence

Dr. John L. Freiberg

Dr. Freiberg, a board-certified neurologist, was deposed by the parties on April 18, 2006. (EX-3). He examined Claimant on May 21, 2002, after referral from the West Jefferson Hospital Emergency Room. Claimant reported developing weakness and walking trouble "in February" and his symptoms "had been getting worse over the intervening time." Dr. Freiberg assessed Claimant as having a compression of his cervical spinal cord and ordered an emergency MRI which confirmed his opinion. (EX-3, pp. 7-8; EX-2, exh. 2, p. 2).

Dr. Freiberg could not relate the cause of Claimant's complaints but only that they began in February 2002. A patient questionnaire completed by Claimant on May 21, 2002, indicates his "numbness and muscle weakness" began four weeks before. (EX-2, exh. 2, p. 3). Claimant stated that in February his symptoms began with pain in his neck and stiffness in his leg. In May 2002, Claimant presented with weakness in his legs, difficulty walking, numbness in his arms and fingertips, neck

pain, spasms in his legs and decreased bladder function. Dr. Freiberg's diagnosis was compression of the cervical spinal cord. (EX-3, p. 9). The MRI revealed that Claimant had large disc ruptures at two levels with compression of his spinal cord and edema in his spinal cord. (EX-3, p. 10; EX-2, exh. 2, p. 5). He opined that such a condition can be caused by trauma or a degenerative process, but he did not form an opinion about the origin of the condition. The only treatment for such a condition is surgery. He referred Claimant to Dr. Steck for evaluation and surgery. (EX-3, p. 11).

Dr. Freiberg could not state whether Claimant reported either his sleeping on a boat or shocking sensation incidents. (EX-3, p. 12).

Based on a hypothetical which approximates the facts as related by Claimant is his deposition testimony about his fallen asleep on a boat and the subsequent grocery incident, Dr. Freiberg testified that "it sounds like he had a ruptured disc on February the 12th that got worse with the second injury." (EX-3, p. 15). He added that based on the hypothetical, the ruptured disc "re-ruptured or the rupture extended." He stated the MRI showed "soft disc rupture as opposed to boney stenosis" in response to an inquiry about "pre-existing cervical stenosis." (EX-3, pp. 16-17). He stated that a disc could be ruptured with very little mechanical provocation. (EX-3, p. 17). He again reiterated, in response to a query about the April incident being an aggravation of the February injury, that "it sounds like he had a ruptured disc on February 12 which has not healed when the second incident occurred and made it worse." (EX-3, p. 18).

In further response to a question about whether the same symptoms could occur without a second incident, Dr. Freiberg stated that given the "theoretical history that was provided, that the second accident did make it worse." (EX-3, p. 20). He added that a "vast majority of [ruptured discs] heal by themselves. But there are, a proportion of them will gradually worsen or worsen at a later date." In the absence of a history of a second incident, he stated Claimant's symptoms could have been consistent with the events of February 2002. (EX-3, pp. 21-22, 25). However, Claimant's condition did not depend on the severity of the trauma of the second incident because the trauma can be "quite trivial, . . . but it doesn't necessarily take a lot of trauma to get it." (EX-3, p. 25). An abrupt arm movement could cause symptomatic consequences. (EX-3, p. 26).

Dr. John C. Steck

Dr. Steck, a board-certified neurosurgeon, was deposed by the parties on April 13, 2006. (EX-2). Dr. Steck first examined Claimant on May 23, 2002, based on a referral from Dr. Freiberg. (EX-2, p. 7; EX-2, exhibit 2, p. 6). He opined that Claimant had "progressive cervical myelopathy." Claimant reported that his symptoms began on the evening of Mardi Gras 2002 when he was riding on a crew boat to go offshore and was in an uncomfortable position and awoke "with a crick in his neck and then developed increasing symptoms of pain in his neck and then pain into his arm." (EX-2, pp. 8-9).

Dr. Steck testified Claimant developed symptoms of bilateral upper extremity numbness and tingling and started to lose the function of his hands; his legs started to become weak and uncoordinated and "started giving out on him." (EX-2, p. 9). He testified Claimant needed surgery since he had cervical stenosis, cord compression and was losing function of his hands and his gait was deteriorating. (EX-2, p. 10).

Dr. Steck described cervical stenosis as a narrowing of the cervical spinal canal "usually due to arthritic changes over time," that can produce "protrusions of the disc; . . . enlargement or calcification of the ligaments; . . . subluxations of the spine" which "compress the spinal cord itself and they cause a constellation of symptoms." (EX-2, p. 11). He described "spondylitic myelopathy" as a spinal cord dysfunction commonly caused by an arthritic condition in the neck with a genesis "like all arthritis; it's kind of a wear-and-tear arthritis that often changes or occurring in the joints of the spine over the years, often asymptomatic and then they reach a critical point where they may become symptomatic." (EX-2, pp. 12-13).

Dr. Steck further confirmed that cervical stenosis is a degenerative condition "that happens over time," and is usually not caused by an accident but which can be aggravated by a traumatic incident. (EX-2, p. 14). Claimant's condition, according to Dr. Steck, was a "case of a multi-level arthritic cervical stenosis . . . the spine was changing over time that abruptly became . . . symptomatic, which is not uncommon with this problem." Claimant's condition existed for years before his incident of February 12, 2002. (EX-2, p. 15). Dr. Steck testified that "without a history of some fall or significant trauma or something, I would not relate this to an accident. This is a degenerative condition which just, I think happened to

become symptomatic while he was riding in this crew boat." (EX-2, p. 16). Dr. Steck's medical report of May 23, 2002, states "there is no other specific accident or injury as his health otherwise is excellent." (EX-2, exh. 2, p. 6).

Dr. Steck recommended a cervical discectomy and arthrodesis with corpectomies at C5 and C6 to decompress the spinal cord. (EX-2, p. 17; EX-2, exh. 2, p. 7). On June 5, 2002, Dr. Steck performed an anterior cervical corpectomy at C5 and C6, microscopic decompression of spinal cord, anterior arthrodesis C4 through C7 and anterior instrumentation with a cross interpole plate C4 through C7. (EX-2, pp. 17-20; EX-2, exh. 2, pp. 10-11). On June 13, 2002, Claimant was neurologically improved with a normal gait and strength. He showed continual gait improvement on July 18, 2002 and August 15, 2002, but with some complaints of neck pain. (EX-2, p. 20; EX-2, exh. 2, pp. 14, 16, 18).

On August 15, 2002, Dr. Steck opined that Claimant was unable to work and should be considered totally disabled for the remainder of the year until he progresses to solid arthrodesis. (EX-2, exh. 2, p. 18). He testified solid fusion would occur in nine months to one year, but the major goal of surgery is the restoration of neurological function which "sometimes takes longer." (EX-2, p. 22).

On September 30, 2002, Claimant reported pain in the right arm and leg with weakness for which an MRI was ordered. (EX-2, pp. 20-21; EX-2, exh. 2, p. 19). It was subsequently determined that Claimant had metastatic prostate cancer. (EX-2, p. 21).

On January 20, 2003, Dr. Steck had a telephone conversation with Claimant who inquired about "the onset of his illness." Dr. Steck's chart note indicates there was a question "whether or not his workman's compensation related. Initially the symptoms started at one job and then seemed to get worse on another job. There does not appear to be any specific accident. It seems to be more of an aggravation that could be work-related." (EX-2, p. 26; EX-2, exh. 2, p. 34). Dr. Steck had no independent recollection of an incident involving Claimant as a relief cook unloading groceries and suffering severe pain nor did he document such an incident. (EX-2, p. 27).

Based upon a hypothetical which assumed events consistent with Claimant's testimony about the boat and grocery incidents, Dr. Steck affirmed it was more probable than not that the grocery incident was an aggravation of Claimant's previous

injury sustained on the boat when Claimant awoke with a stiff neck and the "electrical-type shock and the fairly rapid deterioration suggests that that incident played . . . changed . . . worsened his condition and further aggravated his pre-existing arthritic condition in his neck." (EX-2, pp. 30-33). He agreed that both incidents (the boat and grocery events) were related to the pre-existing cervical stenosis. (EX-2, p. 34). He also confirmed that the initial boat incident, without the grocery incident, would have been sufficient to give Claimant the symptoms he reported. Claimant's symptoms **could** have been the same whether or not there was an aggravation at Stolt. (EX-2, p. 35).

The Contentions of the Parties

Claimant contends that his claim filed on July 17, 2003, is timely, even though it was 17 months after his February 12, 2002 injury, since Employer did not file its LS-202, Employer's First Report of Injury, until August 5, 2003. (EX-11; EX-12). Claimant argues that his first "accident" resulted in a serious injury which was corrected by the surgery performed by Dr. Steck, and, the impact, if any, of the second accident was at most an aggravation of the existing ruptured discs.

Claimant relies upon the testimony of Dr. Freiberg, who examined Claimant after the February 2002 and April 2002 incidents, to argue that his condition was caused by the February 2002 event and it only got worse as a result of the April 2002 event. Claimant urges the application of the "two injury rule" with contribution apportioned between Employer and Stolt. Claimant also contends he is not precluded from entitlement by Section 33(g) of the Act based on "the second injury doctrine" and his good faith, but inadequate, settlement with a second employer, Stolt.

Claimant contends he is entitled to disability compensation and medical care and treatment from Employer for the injury suffered in February 2002.

Employer argues Claimant never sought its authorization for any medical treatment for his injury and never made any effort to return to its employment after February 17, 2002. Employer avers that Claimant aggravated any injury sustained in February 2002 by the grocery incident in April 2002 while employed with Stolt. Employer advances a Section 33(g) defense to any recovery based on Claimant's settlement of a civil lawsuit

against Stolt premised on his April 2002 accident/injury without obtaining written approval from Employer.

Employer further asserts that Claimant had no accident while employed with Eurest which led to an injury, he "simply awoke with neck pain," before he even began his work activities as a catering hand offshore. Employer relies upon the testimony of Dr. Steck that he would not relate Claimant's initial complaints to an accident but rather to a degenerative condition which became symptomatic while Claimant was riding in a crew boat. Moreover, Employer argues that Claimant did not sustain a disabling injury in its employ and retained a capacity to earn wages after his alleged incident with Eurest and did so until his April 2002 accident with Stolt, which is responsible for any resulting loss of wage earning capacity and need for medical treatment due Claimant.

Employer argues that the last employer doctrine is applicable here under which Stolt should be assigned liability for any disability and medical care due Claimant since his April 2002 aggravated any pre-existing condition resulting in his disability.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain

Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct 1965, 1970 n. 3 (2003)(in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference)(citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980)("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

A. Timeliness of the Claim

Section 13(a) of the Act provides that the right to compensation shall be barred unless a claim is filed within one year after the injury. If payment of compensation has been made without an award, a claim may be filed within one year after the date of last payment. 33 U.S.C. § 913(a).

The time for filing a claim does not begin to run until the claimant is aware, or by exercise of reasonable diligence should have been aware, of a relationship between the injury and the employment. See Spear v. General Dynamics Corp., 25 BRBS 254 (1991); Spear v. General Dynamics Corp., 25 BRBS 132 (1991)(a claim is not barred under Section 13 where an employer which had actual knowledge of the injury did not file a first report of injury until five months after claimant filed a claim for benefits under the Act).

Section 13 must be read in conjunction with Sections 30(a) and 30(f) of the Act. Wendler v. American National Red Cross, 23 BRBS 408 (1989). Section 30(a) requires that an employer submit to the Secretary of Labor a report of a claimant's injury within ten days of the date it has knowledge of that injury. Pursuant to Section 30(f), **the Section 13 filing period is tolled until such time as the employer complies with the requirements of Section 30(a).** See Bustillo v. Southwest

Marine, Inc., 33 BRBS 15 (1999); Nelson v. Stevens Shipping & Terminal Co., 25 BRBS 277 (1992); Ryan v. Alaska Constructors, Inc., 24 BRBS 65 (1990).

In the present case, Eurest did not file a First Report of Injury until August 5, 2003, after the filing of Claimant's claim on July 17, 2003. Eurest clearly had knowledge of Claimant's "injury" and neck pain in February 2002 when he called for relief from his duties on the production platform. He was instructed to take a few days off from work. Based on the foregoing statutory and jurisprudential precedent, I find and conclude Claimant's filing period was tolled by Eurest's failure to file the required report under Section 30(a) and therefore Claimant's claim was timely filed.

B. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). It is well settled that when something unexpectedly goes wrong within the human frame, there has been an "injury" according to the Act. See Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968).

Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary- that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990).

These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

Claimant's Prima Facie Case

Pursuant to the stipulations of the parties, I find that Claimant suffered an injury on February 12, 2002, and that an employee-employer relationship with Eurest existed at the time. However, Employer contests that Claimant suffered an "accident" while in its employ on that date.

It is evident that the "conditions" as described by Claimant while enroute to an offshore production platform **could have caused** the harm or pain about which he complained, and, I find, is sufficient to constitute an "accident" within the meaning of the Act.

Claimant's **credible** subjective complaints of symptoms and pain, as in the instant case, can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

Thus, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on February 12, 2002, and that his working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

The April 2002 Incident

Employer argues that Claimant's April 2002 incident unloading groceries while employed by Stolt in effect constitutes an aggravation of his condition or an intervening cause which terminates its liability for any work-related condition. Claimant argues the April 2002 incident only temporarily exacerbated his pre-existing condition caused by the accident in February 2002 with Eurest.

The central issue here is which employer is liable for Claimant's disability. The U. S. Court of Appeals for the Fifth Circuit has held that in a case such as this the aggravation rule must be examined and applied. The "aggravation rule" is a

doctrine of general workers' compensation law which provides that, where an employment injury worsens or combines with a pre-existing impairment to produce a new or greater disability than that which would have resulted from the employment injury alone, the entire disability is compensable. Bludworth Shipyard v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT)(5th Cir. 1983); Strachan Shipping Co. v. Nash, 782 F.2d 513 (5th Cir. 1986). A second or final employer, such as Stolt, is liable under the aggravation rule for the entire cost of an employee's disability if the pre-existing impairment was aggravated during the course of the employee's second or final employment. Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283, 290 (5th Cir. 2003).

In the present matter, Claimant was involved in an April 2002 incident unloading groceries while employed by Stolt. There is no credible allegation or any evidence that Claimant's work-related injury of February 2002 caused the second accident or that the April 2002 incident and its residuals were a natural progression of the initial injury. Accordingly, I find and conclude that Claimant's subsequent "shocking sensation" incident was not the natural or unavoidable result of Claimant's February 2002 work-related injury. Thus, the second incident may constitute an aggravation or subsequent injury occurring outside of work with Eurest to relieve it of liability for the subsequent resulting injuries.

Claimant credibly testified that after leaving the production platform he took off work from Monday to Thursday during which time his "pain relieved itself" and "wasn't that bad." He obtained a job with Stolt on Thursday and worked two hitches with no established loss of wage earning capacity. After his first 28-day hitch, his neck was not hurting "that much, if any" and "not hardly at all." He took off four days before accepting another 28-day hitch with Stolt. During the second hitch, he suffered the "shocking sensation" incident which produced numbness in his hands and a feeling of weakness.

After the February 2002 injury, Claimant took Aleve which "did all the good in the world the first time," but not after the shocking sensation incident. He also noticed weakness in his right side and leg and numbness in the tips of his fingers of both hands after the shocking incident. His symptoms progressed to becoming "wobbley" and he began falling down. Claimant testified that after the shocking incident "everything went downhill" and he felt a "whole different pain in there (neck)." He denied informing Stolt that he was not injured "because that is when it happened."

Contrary to Dr. Freiberg's testimony and reports that Claimant was "getting worse over the intervening time," Claimant testified he was getting better over time until the shocking sensation incident. Dr. Freiberg's opinions are clearly and erroneously based on his perception of Claimant's history of an incident in February 2002, contrary to Claimant's patient questionnaire that his symptoms began four weeks earlier than the May 21, 2002 examination. Dr. Freiberg rendered no opinion about causation in this matter.

However, notwithstanding the foregoing, Dr. Freiberg's opinions buttress a conclusion that the shocking sensation incident caused Claimant's disability. Dr. Freiberg was of the opinion that Claimant sustained a ruptured disc in the February 2002 incident, and not a condition caused by "boney stenosis," which got worse after the April 2002 event. Dr. Steck's operative report is devoid of any reference or conclusion that Claimant had a ruptured disc. Nevertheless, Dr. Freiberg agreed that the second "shocking" incident made the February 2002 event worse.

Dr. Steck opined that Claimant suffered from pre-existing cervical stenosis which had been present for years before his February 2002 incident. He further opined that stenosis is not caused by a traumatic accident, but can be aggravated by such an accident. Dr. Steck concluded that the stenosis became symptomatic by Claimant's awaking from an uncomfortable position in February 2002. Dr. Steck was not informed of the April 2002 incident and noted that without a history of a specific accident or injury, he would not relate Claimant's symptoms to an accident.

However, based on the hypothetical propounded in deposition he opined that the second job incident could be a work-related aggravation of Claimant's condition and it was more probable than not that the "shocking incident" aggravated Claimant's injury sustained on the boat in February 2002. He further opined that the shocking sensation incident worsened Claimant's condition and aggravated his pre-existing arthritic condition.

Based on the foregoing, I find and conclude Claimant suffered an acceleration and/or aggravation of his pre-existing stenosis condition in April 2002 which constitutes a second injury that caused a dramatic worsening of Claimant's condition and a greater disability than the symptomatology which existed before the April 2002 incident. His pain and residual condition

became so severe that he was forced to discontinue his seaman schooling and work. Yet, before the April 2002 incident he was actively and gainfully employed by Stolt and had worked almost two full hitches of 28-day periods each. Therefore, I further find and conclude that the preponderance of the evidence of record supports a determination that the April 2002 incident, and not the February incident with Employer, created the disabling injury for which Stolt is responsible. See Crawford v. Equitable Shipyards, Inc., 11 BRBS 646, 653 (1979).

Claimant's reliance on Operators & Consulting Services, Incorporated v. Director, OWCP (Morrison), 170 Fed. Appx. 931 (5th Cir. 2006) is inapposite and not instructive where the claimant's disability and condition was wholly attributable to the natural progression of his original injury. Similarly, the claimant in New Haven Terminal Corp. v. Lake, 337 F.3d 261, 37 BRBS 73 (CRT)(2d Cir. 2003), was found not fully recovered from a 1993 injury before his subsequent 1997 injury, and thus the second employer was not liable for his ongoing disability.

Accordingly, I find Claimant has failed to establish by a preponderance of the record evidence that Employer is responsible for his disability and condition, which was accelerated and aggravated by an injury at Stolt, and that Claimant's compensation claim filed against Eurest should be, and hereby is, **DISMISSED.** See Greenwich Collieries, supra.

In view of the foregoing findings and conclusions, the remaining unresolved issues of nature and extent of disability, entitlement to Section 7 medical care and treatment and the preclusion of compensation by the applicability of Section 33(g) of the Act, are rendered moot.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

Claimant's claim for compensation and medical benefits under the Act is hereby **DENIED.**

ORDERED this 19th day of September, 2006, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge